Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-635

UNITED STATES STEEL CORPORATION, *et al.*, on Behalf of Themselves and All Persons Similarly Situated,

Appellants,

v.

MULTISTATE TAX COMMISSION, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District Court of New York

APPENDICES A-F

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(5573)

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APPENDIX A

THE OPINION OF THE THREE-JUDGE COURT

Memorandum Decision and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 CIV. 3438-CLB

UNITED STATES STEEL CORPORATION, STANDARD BRANDS INCORPORATED, GENERAL MILLS, INC., and THE PROCTER & GAMBLE DISTRIBUTING COMPANY, on behalf of themselves and all persons similarly situated,

Plaintiffs,

and

BRISTOL-MYERS CO., ELTRA CORPORATION, GOODYEAR TIRE AND RUBBER COMPANY, GREEN GIANT COMPANY, INTERNATIONAL HARVESTER COMPANY, INTERNATIONAL PAPER COMPANY, INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, McGRAW-HILL, INC., N.L. INDUSTRIES, INC. and UNION CARBIDE CORPORATION,

Intervenor-Plaintiffs,

against

MULTISTATE TAX COMMISSION, EUGENE F. CORRIGAN, Executive Director, Multistate Tax Commission, and ERIC E. WOHLFORTH (Alaska), RICHARD HEATH (Arkansas), JOHN H. HECKERS (Colorado), J. ED. STRAUGHN (Florida), RALPH W. KONDO (Hawaii), EWING H. LITTLE (Idaho), JAS. O. MATHIS (Indiana), JAMES T. McDONALD (Kansas), ALLISON GREEN (Michigan), JAMES SCHAFFNER (Missouri), J. MORLEY COOPER (Montana), WM. E. PETERS (Nebraska), JOHN J. SHEEHAN (Nevada), FRED L. O'CHESKEY (New Mexico), BRYON L. DORGAN (North Dakota), CHARLES H. MACK (Oregon), ROBERT F. CALVERT (Texas), VERNON L. HOLMAN (Utah), GEORGE KINNEAR (Washington) and E. S. MACCLEAN (Wyoming), all Commissioners of the Multistate Tax Commission from their respective states,

Defendants.

Before MESKILL, C.J., WEINFELD and BRIEANT, D.J.

Brieant, J.

The plaintiff corporations, on behalf of themselves and all multistate taxpayers who have been or may be threat-

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ened with interstate audits by the defendant Multistate Tax Commission, seek a declaratory judgment that the Multistate Tax Compact [Prentice Hall State & Local Tax Service (All States Unit) ¶6310, *et seq.*] is invalid under the United States Constitution, and a permanent injunction barring its operation and enforcement. Subject matter jurisdiction exists pursuant to 28 U.S.C. §§1331, 1332 and 1343(3).

Defendants moved, pursuant to Rule 56, F.R.Civ.P., for summary judgment, which motion was heard before this statutory court convened pursuant to 28 U.S.C. §2281.

Familiarity with the decision of Judge Tenney of this Court, denying defendants' motion to dismiss the complaint, is assumed. 367 F.Supp. 107 (S.D.N.Y. 1973). By a memorandum and order dated February 5, 1974, Judge Tenney granted a motion by various multistate corporations for leave to intervene as plaintiffs, pursuant to Rule 24(b), F.R. Civ.P.[1] The Court further ordered that this suit proceed as a class action with plaintiffs and intervenor-plaintiffs as class representatives.[2]

---

1. Prior to argument of this motion, International Business Machines Corp. and Xerox Corporation withdrew as intervenor-plaintiffs and class representatives, although they remain members of the plaintiffs' class.

2. The terms "multistate taxpayer", or "multistate corporation" as referred to herein comprise those businesses which are engaged in interstate commerce and also are "present" in more than one state for purposes of such state and local taxes as income, capital stock, gross receipts, sales, or use taxes. The Multistate Tax Commission and the Compact which created it seeks to improve the administration and expedite the audit and collection of such taxes against non-resident businesses lawfully subject to such taxes. It does not of itself impose any tax, nor withdraw from any taxpayer any procedural right to contest a tax assessment.

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Plaintiffs contend initially, that upon this record, summary judgment would be inappropriate. They claim that genuine issues exist as to material facts, and assert that their constitutional objections are addressed not only to the Compact itself, but to its operative effects as well. Plaintiffs argue that there must be further discovery before adjudication of these issues. Alternatively, they assert that if summary judgment is appropriate, it should be granted in their favor.

No contention is made that the compact is being administered other than according to its terms, except as to particulars governed by the substantive tax law of the respective party states. The constitutional issues posed by this complaint reduce themselves to questions of law.

Certain of the issues of fact which plaintiffs would seek to raise are purely hypothetical and speculative. As to these issues, plaintiffs have not "set forth specific facts showing that there is a genuine issue for trial." Rule 56 (e), F.R.Civ.P. Certain other claimed issues of fact are plainly not material to the determination of the merits of the constitutional arguments raised here, although they may be of academic interest to the various states in determining whether to join or continue membership in the Compact.

This litigation commenced with the filing of a complaint on August 11, 1972. In October 1973, plaintiffs served their first voluminous set of interrogatories. Since that time, the parties have litigated their respective discovery rights and evidentiary objections. Plaintiffs served a second voluminous set of interrogatories and again the defendants objected. Related cases in various state courts have been stayed pending determination of the issues raised in this

suit. Also, there are three related actions pending in other federal district courts. The Judicial Panel on Multidistrict Litigation, by order filed on February 5, 1976, deferred consideration of consolidation and transfer of these cases, pursuant to 28 U.S.C. §1407, pending disposition of this motion.

The amended complaint seeks declaratory and injunctive relief. Rule 57, F.R.Civ.P., provides that "[t]he Court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." Members of the plaintiffs' class and defendants appear to be prejudiced by the continued operation of the Commission amidst these charges of illegality and constitutional invalidity. For these reasons, and the already prolonged period of time since issue was joined, additional delay for further discovery is unwarranted. Since we find no genuine issues of material fact, summary judgment is appropriate here.

When the amended complaint was filed on January 10, 1973, twenty-one states were signatories to this Compact.[3]

3. When the complaint was filed, the twenty-one member states were Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas, Utah, Washington and Wyoming. Although its Tax Commissioner was not named as a defendant in this action, and no reference has been made to its membership, Alabama apparently has become a party to the Compact, Code of Alabama, tit. 51, §919, and has adopted Article VIII of the Compact by statute, §924.

On August 29, 1975, Illinois withdrew from the Compact. California became a member of the Compact on January 1, 1976. The enabling legislation by which California became a member state was contingent, *inter alia*, upon the Commission adopting a by-law requiring that matters voted upon by the Commission receive for approval a majority vote of the number of member states and a majority of the states weighted as to total population based upon the current United States Statistical Abstract. See West's Cal. Revenue and Taxation Code §38001 (Supp. 1976), notes relating to Cal. Stats. 1974, c.93.

The individual defendants in this action are the Executive Director of the Commission and the tax administrators of the twenty-one respective states, who then served as members of the Commission.

The stated purposes of the Compact are to:

> "1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
>
> 2. Promote uniformity or compatibility in significant components of tax systems.
>
> 3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
>
> 4. Avoid duplicative taxation."

Article III, §1 permits multistate taxpayers to elect to apportion and allocate their income in accordance with the provisions of the Uniform Division of Income for Tax Purposes Act ("UDITPA"),[4] as embodied in Article IV of the Compact or in accordance with otherwise applicable state law. Article III, §2 requires each party state which imposes an income tax to allow smaller taxpayers meeting certain requirements to file a short form return and compute the in-

4. The Uniform Division of Income for Tax Purposes Act ("UDITPA") is a major feature of the Compact and is adopted by those states becoming members of the Compact. UDITPA is not the creation of this Compact, rather it was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1957. Several of the Compact's member states had adopted UDITPA prior to promulgation of the Compact. In addition, UDITPA is in effect in Kentucky and South Carolina, neither of which are members of the Compact. See 7 Uniform Laws Annotated 365 (1970), 258 (Supp. 1976).

come tax due based upon the percentage of their gross sales within the taxing state.

Article V grants purchasers a tax credit for use taxes, in the amount of sales and use taxes previously paid to other states and their subdivisions. This article also recognizes the validity of exemption certificates issued by other states and their subdivisions.

Article VI establishes the Commission and provides for its membership, voting rights, officers, committees and finances. Article VI, §1(g) authorizes the Executive Director of the Commission to appoint and discharge personnel "[i]rrespective of the civil service, personnel or other merit system laws of any party State"; and §1(h) authorizes the Commission to "borrow, accept or contract for the services of personnel from any . . . governmental entity." Section 3 empowers the Commission, in addition to powers conferred elsewhere in the Compact, to:

> "(a) Study State and local law tax systems and particular types of State and local taxes.
>
> (b) Develop and recommend proposals for an increase in uniformity or compatibility of State and local tax laws with a view toward encouraging the simplification and improvement of State and local tax law and administration.
>
> (c) Compile and publish information as in its judgment would assist the party States in implementation of the compact and taxpayers in complying with State and local tax laws.
>
> (d) Do all things necessary and incidental to the administration of its functions pursuant to this compact."

Article VII provides that where two or more party states or their subdivisions have "uniform or similar" tax laws, the Commission may adopt uniform regulations and forms for their administration. Upon adoption by the Commission, the regulations are to be submitted to the appropriate officials of each state or subdivision for consideration and adoption in accordance with its own law.

Article VIII establishes procedures for interstate joint audits to be performed by the Commission on behalf of and at the request of member states. Article VIII is in force only in those states that specifically enact it by statute. Article VIII, §2 permits a member state to request the Commission to perform the audit with expenses to be borne by the requesting taxing authority.

Section 3 of Article VIII authorizes the Commission to require the attendance of witnesses to give testimony and produce records and documents. Section 4 grants the Commission the authority to:

> "apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this Article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the Commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the State or subdivision on behalf of which the audit is being made or a court in the State in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in a State that has adopted this Article."

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Section 5 permits the Commission to decline to perform an interstate audit if the Commission's resources are insufficient, or if it appears otherwise impracticable. Section 5 further authorizes the Commission to make its audit information available to interested party taxing authorities, other than the taxing authority requesting the audit, if the additional interested parties participate in a manner satisfactory to the Commission.

Section 6 of Article VIII imposes a requirement of confidentiality and limits the dissemination of audit information to party states or their subdivisions and to the United States. This information is to be available "in accordance with the laws of the States or subdivisions on whose account the Commission performs the audit, and only through the appropriate agencies or officers of such States or subdivisions." Section 6 also prohibits the Commission from requiring a taxpayer to keep records for any period not otherwise required by law.

Article IX describes an arbitration procedure that the Commission may adopt by regulation "[w]henever the Commission finds a need for settling disputes concerning apportionments and allocations by arbitration."[5]

Article X governs the entry into force of the Compact and withdrawal of party states from the Compact. Any

5. The legislation that enabled California to become a member state expressly provided that California would not continue as a member if the Commission placed in effect the provisions of Article IX, whether the Commission acted voluntarily or under court order. See West's Revenue and Taxation Code §38001 (Supp. 1976), notes relating to Cal. Stats. 1974, c.93. We regard Article IX as being of no more than academic interest. Unless California changes its position, it is unlikely to be implemented, and we do not regard plaintiffs as threatened with its application. Any questions raised thereby had best be held for a future day.

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state may withdraw if it enacts a statute repealing the Compact.

Article XI provides that the Compact is not to be construed so as to:

> "(a) Affect the power of any State or subdivision thereof to fix rates of taxation, except that a party State shall be obligated to implement Article III 2 of this compact.
>
> • • •
>
> (c) Withdraw or limit the jurisdiction of any State or local court or administrative officer or body with respect to any person . . . corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.
>
> (d) Supersede or limit the jurisdiction of any court of the United States."

Article XII states a rule of liberal construction and of severability.

In *Kinnear* v. *The Hertz Corporation*, 545 P.2d 1186 (Wash. Sup. Ct. 1976) (*en banc*), the court was asked to hold, on grounds substantially similar to those advanced here, that Article VIII of the Multistate Tax Compact violated the United States Constitution. The court there affirmed a grant of summary judgment in favor of Kinnear, as Director of the Department of Revenue of the State of Washington, and the Multistate Tax Commission.

Plaintiffs contend that the entire Compact is invalid for want of Congressional approval as required by Article I,

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§10, clause 3 of the United States Constitution, which provides:

> "No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State, or with a foreign power. . . ."

Although absolute in its terms, the Compact Clause has not been construed as requiring Congressional approval of all interstate agreements. *Virginia* v. *Tennessee,* 148 U.S. 503 (1893) states the test applicable in determining whether a particular interstate agreement requires Congressional approval:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." 148 U.S. at 519.

In *Virginia* v. *Tennessee, supra,* the Court found that the boundary agreement there in issue had received Congressional approval. Although unnecessary to the determination of the issues in that case, the rule stated there has been accepted and followed as the test for the need for Congressional approval. The same test has been applied again most recently in *New Hampshire* v. *Maine,* 44 U.S.L.W. 4829, 4831 (U.S.S.C. June 14, 1976).

Both *Virginia* v. *Tennessee, supra,* and *New Hampshire* v. *Maine, supra,* involved agreements between neighboring states for the settlement of disputed state boundaries. The test which *Virginia* v. *Tennessee* establishes has been ap-

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plied in a variety of other contexts. In matters related to state taxation, this test has been applied in upholding the constitutionality of reciprocal legislation and interstate agreements governing tax exemptions and the exchange of tax record information. See, *e.g., Bode* v. *Barrett,* 412 Ill. 204, 107 N.E.2d 521 (1952), *aff'd.* 344 U.S. 583 (1953); *Dixie Wholesale Grocery Company* v. *Martin,* 278 Ky. 105, 129 S.W.2d 181, *cert. denied* 308 U.S. 609 (1939); *Roberts Tobacco Co.* v. *Department of Revenue,* 322 Mich. 519, 34 N.W. 2d 54 (1948).

Applying the test of *Virginia* v. *Tennessee* and *New Hampshire* v. *Maine, supra,* to the Compact here in issue, the Multistate Tax Compact does not increase the political power of the party states. The Commission is vested with no taxing authority; the taxes which it administers are only those imposed by the respective states and subdivisions in accordance with state law.

Nor does the Commission have legislative power; it may propose model regulations where two or more party states or their subdivisions have uniform or similar laws. Such proposals may be adopted, modified, or rejected by the duly authorized tax officials of the affected states.[6]

The Commission does have the power to conduct audits, but only at the request of a party state or its subdivision. In aid of this power, the Commission is authorized to seek the compulsory process of courts having jurisdiction within

6. Proposing model uniform legislation is a function performed by such organizations as the National Conference of Commissioners on Uniform State Laws, bar organizations and public interest groups. As with the proposals of such groups, the recommendation of the Commission may be persuasive, but the decision whether to enact the recommended legislation or regulations lies solely with those officials designated by each state's constitution and laws.

the party states. The Commission does not have the authority to enforce any tax liability; that, too, remains within the jurisdiction of the respective taxing authorities. Any grievance that a taxpayer may have with the results of a Commission audit or the tax liability resulting therefrom is justiciable in the taxing state in accordance with the same procedures governing the grievances of intrastate taxpayers.

Similarly, it is clear that the Compact does not encroach upon or interfere with federal supremacy. Although Congress may be constitutionally empowered by the Commerce Clause, Article I, §8, clause 3, to legislate and regulate the interstate administration of state tax systems, Congress has yet to exercise this power. Plainly, this failure to act has not preempted the states' powers in the field of multistate tax administration. Since the states may act individually in this area, there is no greater encroachment upon the federal interest by their acting cooperatively. Notwithstanding this Compact, Congress could enact comprehensive legislation that would preempt the power.

In *Virginia* v. *Tennessee, supra,* at 518, the Court observed that "[t]here are many matters upon which different states may agree that can in no respect concern the United States." Although the problems of multistate tax administration might be a concern of federal interest, that concern has not been evidenced by legislation in this area. As yet, there are no federal statutes or expressed Congressional policies with which this Compact could interfere. In the event of federal preemption in the future, defendants must withdraw *pro tanto* in order that any such federal statute shall be supreme.

Plaintiffs next contend that the Compact violates the Commerce Clause in several respects. Plaintiffs' first contention in this regard is that Congress, under its power to regulate interstate commerce, has preempted the field. As we noted previously regarding the issue of encroachment upon federal supremacy, there has been no such federal preemption. It is now established that

> ". . . federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963).

See also *Merrill Lynch, &c.* v. *Ware,* 414 U.S. 117, 139 (1973). There is nothing inherent in the problems of multistate tax administration that would require federal regulation, nor has Congress yet identified these problems as a matter of peculiar federal concern.

Second, plaintiffs contend that the Compact imposes an undue and unreasonable burden upon interstate commerce.

> "It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. 'It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.' *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 254 (1938)." *Colonial Pipeline Co.* v. *Traigle,* 421 U.S. 100, 108 (1975).

Indeed, plaintiffs do not contend that the Commerce Clause bars imposition of the respective state taxes which the Com-

mission is charged with administering for the benefit of member states. A necessary correlative of the power to impose taxes is the power to audit, and determine the tax liability properly for each taxpayer.

The stated purposes of this Compact, *supra,* are to promote uniformity among state tax systems, ease taxpayer compliance and minimize the risk of duplicative taxation of the multistate taxpayer. Plaintiffs contend that the Compact promotes disparity, not uniformity. In support of this contention, plaintiffs argue that the voluntary nature of Compact membership and the fact that only twenty-one states have joined necessarily limits its reach. Plaintiffs further argue that the advisory powers granted to the Commission are insufficient to override the differences in the substantive tax laws of the party states. Plaintiffs' characterization here of a compact binding only a loose and powerless confederation stands in sharp contrast to their simultaneous characterization of the Compact as intruding upon the federal supremacy and increasing the political power of the states. That the Compact may promise more than it has as yet achieved is no ground for finding unconstitutionality. The member states have ceded no sovereignty over tax matters to the Commission. The fact that the Compact might promote a consensus among party states on principles of allocation of revenues or other matters, does not create an impermissible burden upon interstate commerce. This is so for at least two reasons: first, even without the Compact, the states could enact parallel or uniform tax legislation, as has been done with UDITPA itself; and second, any agreement between two or more states to

observe an identical principle of state tax law diminishes the existing possibility of fifty disparate state tax results. In sum, we find no merit to the contention that the Compact is an unconstitutional burden upon interstate commerce.

Plaintiffs' next argument charges that the Compact discriminates against multistate taxpayers, and for that reason is invalid under the Commerce Clause, the Equal Protection Clause and the Due Process Clause. Specifically, they allege three areas of discriminatory treatment: first, that Commission auditors are not subject to the civil service requirements of the party states; second, that Commission auditors would not be subject to state criminal penalties for disclosure of confidential audit data; and third, that the subpoena powers of the Commission exceed those of the individual states and therefore exceed the subpoena powers to which intrastate taxpayers are subjected.

Plaintiffs contend that the difference in auditor qualifications discriminates against multistate taxpayers because Commission audits may be conducted by auditors who are not as knowledgeable about the substantive tax law of the particular state on whose behalf they are acting. The Compact authorizes the Executive Director to assemble a staff for the Commission from two sources: first, he is authorized to appoint personnel without regard to any state's civil service requirements; second, he is authorized to contract for the services of personnel from other governmental bodies who presumably would be subject to civil service requirements of the individual employer states. If the Executive Director contracts for the use of personnel from a particular state to participate in a joint audit for that

state, the taxpayer would have no grievance with regard to the qualifications of the auditor.

Although the Compact appears to create a distinction between the qualifications for Commission personnel charged with conducting multistate audits and those civil service auditors who perform similar audits of intrastate taxpayers, this distinction is of no consequence. Commission auditors, as well as their civil service counterparts, are charged with auditing taxpayers and fixing tax liability in accordance with the tax laws and regulations of the respective states. Each auditor is bound by the same law. If a taxpayer's liability is computed erroneously whether by a Commission auditor or by a state civil service auditor, the taxpayer is aggrieved and has recourse to all those remedies the taxing state provides. It is not a demonstrated principle that tax auditors having civil service status work with any greater or less diligence or ability than those who lack job tenure.

In *American Motorists Insurance Company* v. *Starnes*, 44 U.S.L.W. 4652 (U.S.S.C. May 19, 1976), the Court upheld a Texas statute that appeared to limit venue in suits against domestic corporations by requiring a preliminary venue hearing while denying foreign corporations any such hearing, thereby permitting greater latitude in suits against foreign corporations. In so holding, the Court stated:

> " '. . . [I]t is fundamental rights which the Fourteenth Amendment safeguards, and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given, therefore, a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights

> which are thus protected and preserved have been denied because the state has deemed best to provide for a trial in one forum or another. It is not, under any view, the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail.' *Cincinnati St. Louis R. Co.* v. *Snell*, 193 U.S. 30, 36-37 (1904). We are not confined to the language of the statute under challenge in determining whether that statute has any discriminatory effect. Just as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, . . . so may a statute discriminatory on its face be nondiscriminatory in operation." 44 U.S.L.W. at 4654.

Here, plaintiffs may be subjected to audits performed by different personnel. The different auditors are required to apply the same substantive tax law and errors are reviewable by the same tax appeal procedures. We find no merit to the plaintiffs' constitutional claim on this ground.

Plaintiffs next contend that Commission auditors might not be subjected to state criminal penalties imposed for disclosure of confidential audit data since any such criminal violation may occur under circumstances beyond the state's criminal jurisdiction. Article VIII, §6 provides that the "[a]vailability of information shall be in accordance with the law of the States or subdivisions on whose account the Commission performs the audit." As a result, Commission audit information would be publicly available only to the same extent as it would be had the taxing authority, requesting the Commission audit performed that audit itself. If state law bars disclosure of certain information under

particular circumstances, that prohibition would apply to Commission audit information under like circumstances. Whether the audit is performed by Commission auditors or state auditors, the prohibitions against disclosure are the same.

As taxpayers, plaintiffs are justifiably concerned with the confidentiality of audit information, but, as to these prohibitions against disclosure, plaintiffs are not subjected to discriminatory treatment. The enforcement of criminal sanctions is a concern of the public prosecutor, as to which these plaintiffs lack standing. Any discrimination in criminal penalties imposed on others, or whether others are subject to criminal penalties at all, would not prejudice these plaintiffs. We may, and do, assume that Commission auditors, acting as agents for the party states, will obey the laws of the states on whose behalf they are acting, and perform their duties honorably.

Plaintiffs next contend that the Compact discriminates against multistate taxpayers in that it vests in the Commission broader subpoena powers than those possessed by the individual states. Generally, a person or corporation subject to a state court's *in personam* process may be compelled to produce books and records in his custody and control, whether located within or without the court's jurisdiction. A corporation that is present in a state by reason of doing business there, and accordingly, amenable to taxation, is also subject to the *in personam* process of the taxing state's courts. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945). Therefore, a multistate corporation may be required to produce its relevant books and records in any state in which it is present and therefore taxable.

The Commission's subpoena power is no broader than that of the party states. The Commission has no powers of subpoena or contempt apart from the powers of the state courts whose jurisdiction it invokes. Each party state asserting a claim of tax liability might subpoena such books and records as are necessary to determine the taxpayer's liability. The Commission is merely empowered to seek from the courts compulsory process to enable it to perform the same task in a coordinated fashion for the joint benefit of the requesting taxing authorities.[7]

Although we do not find the Commission's powers broader than those of the constituent states, to the extent that the Commission may be enabled to use its subpoena powers in ways in which no single state can, we find that this difference does not constitute an invidious discrimination against multistate taxpayers. Different and more complex problems are raised in the taxation of multistate and multinational corporations that are not encountered in the taxation of intrastate businesses. Specifically, multistate taxation raises the risk of duplicative taxation, and the problem of the proper allocation of tax bases among

7. This practice will be of benefit to multistate taxpayers. In these days of the computer, many multistate taxpayers, present in a number of states, tend to centralize their record keeping in one place, often remote from a taxing authority. Such a remote taxing authority can, under familiar constitutional principles, compel attendance before it of competent employees having knowledge, together with sufficient underlying documentation to permit spot check verification of the computerized data. Such personnel and records cannot be in more than one place at a time. Common sense dictates, therefore, that examinations should take place where the records are kept. The Compact was a common sense approach to solve the chaos which would result if taxpayer's personnel, or alternatively, state taxing authorities were required to spend most of their time on the road.

the several taxing jurisdictions, issues which do not arise where a business is subject to taxation in only one jurisdiction. The different treatment, if any, accorded multistate taxpayers by the Compact is a permissible legislative response to what is perceived as the different circumstances of the multistate taxpayer. See *Kahn* v. *Shevin*, 416 U.S. 351 (1974); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

Plaintiffs' final contention is that the Compact, or that portion of the Compact relating to the production of books and records for joint audit purposes, violates the Fourth Amendment in that it compels them to disclose data to an extralegal and unlawfully constituted body, that is, the Multistate Tax Commission. We find no merit to this contention. For the reasons stated above, we find the Compact to be lawful, and the Compact's creature, the Commission, to be a lawfully constituted body.

Such other Fourth Amendment rights as may be asserted by the conclusory allegations of the amended complaint are not ripe for adjudication. The Fourth Amendment affords corporations some measure of protection against unreasonable search and seizure. A governmental body might, in a given case, violate those rights by an abuse of its subpoena power. Whether particular demands for the production of books and records are unreasonable can only be determined in the context of a demand for the production of particular records of a taxpayer for the purposes of a particular joint audit. The Commission must seek the process of a court to require production of books and records. Determination of whether a particular de-

mand is unreasonable is best reserved for litigation in the court issuing process in a given case. None of the representative plaintiffs here have been subpoenaed to produce documents.

Plaintiffs' prayer for relief is denied in all respects, and pursuant to Rule 58, F.R.Civ.P., the Clerk will enter judgment in favor of the defendant.

So Ordered.

Dated: New York, New York
July 8, 1976

/s/ THOMAS J. MESKILL

THOMAS J. MESKILL

/s/ EDWARD WEINFELD

EDWARD WEINFELD

/s/ CHARLES L. BRIEANT

CHARLES L. BRIEANT

APPENDIX B

THE DECISION OF JUDGE TENNEY, 367 F.SUPP. 107 (S.D.N.Y. 1973)

Appendix B

Memorandum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 3438 (CHT)

UNITED STATES STEEL CORPORATION, *et al.*,

Plaintiffs,

against

MULTISTATE TAX COMMISSION, *et al.*,

Defendants.

TENNEY, J.

In the instant action defendants, not having filed an answer, move pursuant to Fed. R. Civ. P. 12 to vacate the service of the summons and complaint and to dismiss the action on the grounds that this court lacks jurisdiction over the subject matter of the action and the persons of the defendants, and that the complaint fails to state a claim upon which relief can be granted. For the reasons cited *infra*, the motions are denied in all respects.

Appendix B

I. Background

In response to the widespread recognition that, as applied to the multistate corporations which dominate the nation's economy, traditional state tax administration was inadequate, ineffective and excessively costly both to the states and to businesses, the Multistate Tax Compact (hereinafter the "Compact"), allegedly designed to achieve greater uniformity of state taxation of interstate business and to reduce double taxation, purportedly went into effect in its party states on August 4, 1967, after seven states had adopted it. (Art. X, §1 of Compact, Appendix A to Defs.' Brief in Support of Motion.) At present 21 states have adopted the Compact.[1]

The Compact established the defendant Multistate Tax Commission (hereinafter the "Commission") to administer its provisions. (Compact, Art. VI.) The Commission is composed of a member from each party state who generally is that state's chief administrator of the types of taxes to which the Compact applies;[2] each member, or

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1. These 21 states are: Alaska, Alas. Stat. §43.10.010; Arkansas, Ark. Stat. 1947, §84-4101; Colorado, Colo. Rev. Stat. 1963, Art. 74-14; Florida, Fla. Stat. Ann. §213.15; Hawaii, Hawaii Rev. Stat. §255-1; Idaho, Idaho Code. §63-3701; Illinois, Ill. Rev. Stat. §120-871; Indiana, Burns' Ind. Stat. Ann., §64-4464; Kansas, Kan. Stat. Ann. §79-4307; Michigan, Mich. Comp. Laws Ann. §205.588; Missouri, Mo. Rev. Stat., 1969 §32.200; Montana, Mont. Rev. Code 1947, §84-6701; Nebraska, Neb. Rev. Stat. 1943, §77-2901; Nevada, Nev. Rev. Stat. §376.060; New Mexico N.M. Stat. Ann. 1953, §72-15A-37, 44; North Dakota, N.D. Cent. Code, §57-59-08; Oregon, Ore. Rev. Stat. §305.675; Texas, Tex. Civil Stat., Art. 7359(a); Utah, Utah Code Ann. 1953, §59-22-1; Washington, Wash. Rev. Code Ann., §82.56; Wyoming, Wyo. Stat. 1957, §39-376.

2. The Compact deals primarily with state net income taxation of interstate businesses, but Article V of the Compact also deals with sales and use taxes.

Commissioner, is named as a defendant in the instant lawsuit. The Commission elects officers from among its members and appoints an Executive Director who is the Secretary and chief administrator of the Commission. At present, defendant Eugene Corrigan is Executive Director. The Commission has its headquarters in Boulder, Colorado, and is a citizen of the State of Colorado; it also maintains an office in Chicago and one in New York City.

Article VII of the Compact gives the Commission the power to adopt uniform regulations for the administration of tax laws which are uniform or similar in two or more party states and to prescribe uniform tax forms. The regulations adopted by the Commission are not binding upon the party states; each party state may individually consider such regulations for adoption in accordance with its own laws and procedures.

Before the Compact went into effect, the most serious problem in state corporate income tax law lay in the area of apportionment and allocation of the income of a multistate corporation to the states in which it is taxable. Article IV of the Compact seeks to alleviate this difficulty by allowing a multistate taxpayer to apportion and allocate its income under the apportionment formula and rules for specific allocation set forth in the Compact or by any other method available under state law. The Commission has adopted regulations dealing with the allocation and apportionment of income under Article IV. Plaintiffs state, however, that they believe only three party states (Oregon, Indiana and Alaska) had adopted any of these regulations as of December 31, 1972. (Pls.' Brief in Opp. at 13-14.)

Article III of the Compact provides that the party states will allow a "small taxpayer" (defined as one whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property, and whose dollar volume of gross sales made during the tax year within the state or subdivision is not in excess of $100,000) to elect to pay a tax on its gross sales in lieu of the tax on net income. Not all party states have adopted the option and evidently several of those which have adopted it have not yet adopted a related tax rate.

Article IX allows the Commission, at the option of the taxpayer, to arbitrate disputes concerning apportionment and allocation but only with respect to a claim of double or multiple (but not over-) taxation. The arbitration procedure requires the adoption by the Commission of a regulation for it to become effective. No such regulation is in effect.

The most significant power of the Commission (and the real bone of contention between the parties) is its authority under Article VIII of the Compact to conduct "interstate audits" of multistate corporations. Such audits may relate to any tax or license fee imposed in whole or in part for revenue purposes. In general, the Commission may conduct audits upon the request and on the behalf of one or more states party to the Compact or it may itself offer to conduct an audit based upon its determination that such audit would be "of interest" to a number of party states. The Commission has broad subpoena power and the authority to seek court enforcement in connection with the

carrying out of its audit responsibilities. Article VIII is in force only in those party states which specifically have adopted it, 17 to date.[3]

Although several bills[4] have been introduced in Congress for the purpose of obtaining Congressional consent to the Compact, Congress has yet to act.

The impetus for the instant lawsuit was a demand by defendant Corrigan that plaintiffs submit to the audits provided for in Article VIII of the Compact. Plaintiffs challenge the constitutionality of the Compact on the grounds: (1) that the Compact, and, therefore, any audit demanded pursuant thereto, is invalid under the compact clause, Art. I, §10, Cl. 3, U.S. Const., because Congress has not given its consent; (2) that the Compact encroaches upon the power of Congress to regulate commerce among the several states under the commerce clause, Art. I, §8, U.S. Const., and imposes unreasonable burdens in interstate commerce; (3) that the Compact violates the due process and equal protection clauses of the fourteenth amendment; and (4) that the Compact violates the fourth amendment's proscription against unreasonable searches and seizures. Jurisdiction is alleged under 28 U.S.C. §§1331 (cases arising under the Constitution wherein the value in controversy exceeds $10,000), 1332 (diversity of citizenship), and 1343 (3) (deprivation under color of state law of rights secured to plaintiffs under the Constitution). The action is brought as a class action, seeks declaratory and injunctive relief, and requests the convening of a three-judge court under 28 U.S.C. §§2281 and 2284.

3. The 17 states are Alaska, Arkansas, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Michigan, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Texas and Washington. Arkansas' adoption of Article VIII is contingent upon a recommendation from that state's Commissioner of Revenue that it be made effective, and further contingent upon approval of the Governor.

4. *See* S. 3892, 89th Cong., 2d Sess. (1966); S. 883, S. 1551, H.R. 9476 and H.R. 13682, 90th Cong., 1st Sess. (1967); S. 1198, H.R. 6246 and H.R. 9873, 91st Cong., 1st Sess. (1969); S. 1883 and H.R. 6160, 92d Cong., 1st Sess. (1971); S. 3333, 92d Cong., 2d Sess. (1972).

II. Subject Matter Jurisdiction

A. Eleventh Amendment Immunity

Defendants, in support of their motion to dismiss, argue, first, that this court has no jurisdiction over the Commission *qua* commission on the ground that, because the Commission is an agency of states which have not consented to be sued, the eleventh amendment to the United States Constitution bars this action. The Court disagrees.

The eleventh amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

To say that a state agency is entitled to eleventh amendment immunity presupposes the constitutional validity of that agency. Where, as here, it is charged that the agency itself is constitutionally invalid, the eleventh amendment is no bar.

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one

Appendix B

instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate, if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, *which forbid the States . . . without the consent of Congress, from . . . entering into any agreement or compact with other States* . . . which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations." *Prout* v. *Starr,* 188 U.S. 537, 543 (1903) (emphasis added).

Defendants' reliance on Port of New York Authority and Water Front Commission of New York Harbor cases, *Wolkstein* v. *Port of New York Authority,* 178 F. Supp. 209 (D.N.J. 1959); *Rao* v. *Port of New York Authority,* 122 F. Supp. 595 (E.D.N.Y. 1954), *aff'd per curiam,* 222 F.2d 362 (2d Cir. 1955); *Maroney* v. *Waterfront Commission of New York Harbor,* 52 Misc. 2d 424, 276 N.Y.S. 2d 362 (Sup. Ct. 1966); *Bush Terminal Co.* v. *City of New York,* 152 Misc. 144, 273 N.Y.S. 331 (Sup. Ct. 1934), *aff'd,* 256 App. Div. 978, 11 N.Y.S.2d 554 (1939), *aff'd,* 282 N.Y. 306, 26 N.E.2d 269 (1940), for the proposition that a commission established by multistate compact is entitled to eleventh amendment immunity is erroneous since in those cases, unlike the case *sub judice,* the compact establishing the authority or commission had been approved by Congress so that the compact's validity was not at issue.

Appendix B

Even if there were no question of the constitutional validity of the Commission, the mere fact that an agency is a valid state agency would not automatically entitle it to eleventh amendment immunity as a matter of law. In each case, the facts must be closely scrutinized to determine whether the agency in question is, in effect, an arm or alter ego of the state so as to entitle it to immunity, *State Highway Commission* v. *Utah Construction Co.,* 278 U.S. 194 (1929); whether immunity has been expressly or impliedly waived, *Kennecott Copper Corp.* v. *Tax Comm'n,* 327 U.S. 573, 579-80 (1946); and whether the state is the real party in interest, *Smith* v. *Reeves,* 178 U.S. 436 (1900). No single factor is dispositive in determining whether state immunity attaches to any one of its agencies. *Pennsylvania Turnpike Commission* v. *Welsh,* 188 F.2d 447 (3d Cir. 1951).

With regard to the individual Commissioners as defendants, a suit against a state official is not considered a suit against the state in violation of the eleventh amendment where the actions of the official which are challenged (1) are beyond the authority granted him by a valid statute or (2) are performed pursuant to an unconstitutional statute. In both situations, relief can be granted without impleading the state because of the officer's lack of delegated power; the only difference betwen the first and second situations is that in the second "power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity." *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689-90 (1949). In the leading case of *Ex parte Young,* 209 U.S. 123 (1908), the Supreme court upheld a lower court's injunction against the Attorney General of Minnesota restraining him from enforcing a

state statute reducing railroad rates and providing severe penalties for any railroad which failed to comply. Plaintiffs charged that the new rates were unjust, unreasonable and confiscatory and would deprive the railroad companies of their property without due process of law. Over the Attorney General's objection that the suit was in fact a suit against the state in violation of the eleventh amendment, the Supreme Court held:

> "The . . . use of the name of the State to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official. . . . If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such an enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.* at 159-60.

In the instant case the defendant Commissioners are charged with acting under a constitutionally invalid state statute, *i.e.*, the statutes of the respective states adopting the Compact. That would seem to place them squarely within the *Young* doctrine. Defendants make the unique argument, however, that because the Commissioners cannot act singly, but only as a group (*i.e.*, the Commission acts only by majority vote of the Commissioners) this fact somehow removes them from the *Young* exception to eleventh amendment immunity. No authorities support such a proposition and defendants' assertion is contrary to cases ranging from *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894), where the individual railroad commissioners, as well as the railroad commission, were enjoined from enforcing illegal fixing of rates, through the modern civil rights cases such as *Wilgus* v. *Peterson*, 335 F. Supp. 1385, 1389 (D. Del. 1972). The cases cited by defendants in support of their argument—*Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47 (1944); *O'Neill* v. *Early*, 208 F.2d 286, 288 (4th Cir. 1953)—are distinguishable. None of their holdings depended upon the fact that several state officials were named as defendants collectively, but, rather, were clearly based on the proposition that a suit to recover state treasury funds is barred by the eleventh amendment where the state has not consented to be sued. In the instant suit, however, plaintiffs seek declaratory and injunctive relief against the individual Commissioners, not a money judgment from the state.[5] Likewise, *Knight* v. *State of New York*, 443 F.2d 415 (2d Cir. 1971), cited by defendants, is inapposite. In that case plaintiff originally had brought suit against the State of New York seeking the return of property appropriated by the state. The state moved to dismiss and plaintiff moved to add as a defendant the state official involved. The state's motion was granted, and defendant's was denied. The Court of Appeals affirmed on the ground that at the time of suit, title had vested in the state and plaintiff's suit therefore would require affirmative ac-

5. *See Rothstein* v. *Wyman*, 467 F.2d 226, 238 (2d Cir. 1972), for a recent case enunciating this distinction.

tion by the state to return the property. In so holding, however, the court noted:

> "It is equally clear that, under the doctrine of Ex parte Young, . . . a person in Knight's position could have sued for an injunction in the federal courts, in advance of the taking, to restrain the commissioner from effecting the appropriation. . . ." *Id.* at 419.

As long as the individual Commissioners remain as commissioners they must be deemed to acquiesce in any action taken by the Commission and thus would be the proper parties to enjoin if a constitutional violation is found to have occurred.

B. The Tax Injunction Act of 1937, 28 U.S.C. §1341

Defendants contend that 28 U.S.C. §1341 bars plaintiffs from maintaining this lawsuit in federal district court. That section provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

In determining whether to exercise jurisdiction in a particular case, the Court must carefully weigh two countervailing considerations set forth by the statute: (1) a long standing policy of non-interference by federal courts in state tax matters; and (2) fairness to plaintiffs, *i.e.*, whether plaintiffs have an effective state remedy. "The cases construing [§1341] show that the broad language of the statute has been limited by numerous exceptions. . . ." *Builders & Developers Corp.* v. *Manassas Iron & Steel Co.*,

208 F. Supp. 485, 491 (D. Md. 1962). Under the terms of the statute itself, a federal court must decline jurisdiction only when the plaintiffs have a "plain, speedy and efficient remedy" in the state courts. Although the state remedy need not be "the best remedy available", *Bland* v. *McHann*, 463 F.2d 21, 29 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973), its existence will not bar federal relief where the state remedy is "unduly burdensome". *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299 (1952). The test is whether the state remedy is "adequate". *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 605 (1951); *Hillsborough* v. *Cromwell*, 326 U.S. 620, 624 (1946).

Defendants suggest that there are four methods by which plaintiffs can raise their constitutional claims in state court, any one of which is sufficiently "plain, speedy and efficient" to deprive this court of jurisdiction: (1) a suit for declaratory and injunctive relief in the courts of each of the 17 states which have adopted Article VIII of the Compact; (2) administrative review pursuant to statutes of each of the Compact states of the tax assessment imposed by each state after audit, followed by judicial review of the proposed administrative action in the courts of each of the member states; (3) interposition of their constitutional claims as a defense to subpoena enforcement actions brought either by a Commissioner *qua* commissioner or as agent for a Compact state requesting an audit; or (4) a suit in the Colorado state courts for declaratory and injunctive relief.

The first two suggested courses of action, and probably and third, share a common problem—multiplicity of suits; plaintiffs would have to bring at least 17 suits to obtain

the same relief that can be obtained in the federal courts via one lawsuit. The reference to "such state" in §1341 clearly indicates that the statute contemplated that the taxing authority of only one state would be involved and cannot mean that a taxpayer must resort to the courts of 17 states to obtain relief. It is not persuasive to argue, as defendants have in their brief, that the resulting multiplicity of actions "is nothing more nor less than the normal costs and burdens of conducting a multistate enterprise." (Defs.' Reply Brief at 8.) The test is whether the state remedy is "plain, speedy and efficient". The necessity for such a multiplicity of actions cannot by any stretch of the imagination be considered a viable alternative to federal suit, but rather, falls into the category of state remedies which are considered "unduly burdensome". *Georgia R.R. & Banking Co.* v. *Redwine, supra,* 342 U.S. 299.

This interpretation of the statute is supported by the case of *Matthews* v. *Rodgers,* 284 U.S. 521 (1932), cited by defendants. The Court in *Matthews* refused to grant plaintiff taxpayers an injunction against a state taxing authority where they had an adequate remedy under state law by paying the tax and suing for a refund. In particular, the Court held that the state remedy was adequate *precisely because* each taxpayer would only have to bring one suit to vindicate his rights as a taxpayer. The Court indicated, however, that federal equity jurisdiction would obtain if plaintiffs would have had to bring numerous suits to vindicate their rights:

> "In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties, involving the same issues of law and fact." *Id.* at 529-30.

Cases decided after the passage of the present version of §1341 have sustained federal jurisdiction where the alternative state remedy involved a multiplicity of suits. *See Georgia R.R. & Banking Co.* v. *Redwine, supra,* 342 U.S. 299; *Louisville & Nashville R.R.* v. *Public Service Commission,* 249 F. Supp. 894 (M.D. Tenn. 1966), *aff'd,* 389 F.2d 247 (7th Cir. 1968).

The first suggested course of action is also inadequate because it is doubtful whether plaintiffs could acquire *in personam* jurisdiction over the Commission and its Executive Director in Compact states where the Commission maintains no office and conducts no audits. With respect to state actions for declaratory judgments, some of the states in question have strict statutory provisions requiring joinder of interested parties before declaratory relief can be granted.[6] Moreover, most of the declaratory judgment statutes set forth in Appendix C to defendants' brief require that declaratory relief, if granted, terminate the controversy. In a situation where plaintiffs may not be able to obtain jurisdiction over the proper parties, the state declaratory judgment remedy can hardly be said to be adequate.

The second suggested course of action has another infirmity: because it is unavailable to plaintiffs until after the audits have been conducted, it might cause plaintiffs irreparable injury. Plaintiffs would be required to turn

6. *See, e.g.,* Ark. Stat. Ann. 34-2510, under which failure to join a party results in denial of declaratory relief.

over their books and records to persons whose authority and qualifications they claim are invalid. In cases where irreparable injury would occur if no injunction were to be granted, federal courts will entertain suit. *Denton* v. *City of Carolton,* 235 F.2d 481 (5th Cir. 1956); *Adams County* v. *Northern Pacific Ry. Co.,* 115 F.2d 768 (9th Cir. 1940). Moreover, a perusal of the statutory provisions cited in Appendix E to defendants' brief indicates that the scope of review in administrative proceedings protesting a tax assessment is narrow indeed, *i.e.,* it is limited to a determination of the correct amount of tax due.

Defendants' suggestion that plaintiffs raise their constitutional claims by way of a defense to a subpoena enforcement action is likewise without merit. Not only does this procedure involve a potential multiplicity of lawsuits, since Article VIII of the Compact provides that the Commission must apply for an enforcement order to the courts of an Article VIII Compact state, but also, it has been settled since *Ex parte Young, supra,* 209 U.S. at 163, that one does not have to wait to raise constitutional claims by defending an enforcement action:

> "To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid." *Id.* at 165; *see also Georgia R.R. & Banking Co.* v. *Redwine, supra,* 342 U.S. at 303 n.11.

Finally, defendants assert that an examination of the statutes and rules of Colorado, where the Commission and

its Executive Director maintain their offices, discloses that this suit is maintainable in the state courts of Colorado. Assuming, *arguendo,* that all defendants assert with regard to the availability of declaratory relief, class actions and long-arm jurisdiction in the state courts of Colorado is true, it is questionable whether the Colorado courts would be willing to declare the tax laws of numerous sister states unconstitutional, and if they were, whether those sister states would be bound by Colorado's decision. Where, as here, the adequacy of the state court remedy is uncertain, there is no "plain" state remedy and the federal court can exercise jurisdiction under §1341. *Spector Motor Service, Inc.* v. *O'Connor, supra,* 340 U.S. 602; *Hillsborough* v. *Cromwell, supra,* 326 U.S. 620; *United States* v. *Livingston,* 179 F. Supp. 9 (D.S.C. 1959), *aff'd,* 364 U.S. 281 (1960). Moreover, where the choice is between a federal court passing on the constitutionality of the tax laws of 21 states or the courts of Colorado passing on the constitutionality of the tax laws of 21 states, this Court does not believe that §1341 requires a federal court to decline jurisdiction in favor of the Colorado courts. When the power of the federal court to enjoin state officials was first firmly established in *Ex parte Young, supra,* 209 U.S. 123, a storm of controversy arose as to the propriety of one judge enjoining state legislation; this controversy led to the enactment of the initial statute requiring three federal judges to hear actions challenging the constitutionality of state legislation and providing for expedited review by the Supreme Court. *See* Hart & Wechsler, *The Federal Courts and the Federal System* 967 (2d ed. 1973). If such protections of a court of special dignity and expedited review are

deemed necessary in a situation where there is, by virtue of the supremacy clause, a relationship of superior to inferior sovereignty, far greater restraint is necessary when the relationship between sister states is involved. Even if there were no questions of comity and sovereign rights, there is the important procedural feature that violation of a federal injunctive order may be punished by the issuing court regardless of where the infringement takes place. On the other hand, an injunction issued by a Colorado court would not *ipso facto* have effect in another jurisdiction. Therefore, even if plaintiffs were able to obtain injunctive relief in the Colorado state court, they would have to bring a new action in each of the other states to enforce it. Multiple litigation is thus also a necessary concomitant of filing suit in the Colorado courts. In such circumstances plaintiffs' only effective remedy lies in the federal courts.

III. *In Personam* Jurisdiction

The defendant Commission was served with process within the State of New York through service upon one Patrick Greene, a Commission tax auditor, at the Commission's New York City office. Additionally, all defendants were served outside the State of New York: the Commission in Colorado through defendant Corrigan, and the individual Commissioners in their home states.

Defendants argue that the service upon the Commission within the State of New York by serving Greene with a copy of the summons and complaint at the Commission's New York office was ineffective to grant in personam jurisdiction over the Commission. They argue further that the out-of-state service did not give this court in personam

jurisdiction on the grounds that the New York "long-arm" statute, N.Y. C.P.L.R. §302 (McKinney 1972), has no application to this lawsuit (1) because §302 does not apply to sister states, their agencies or public officers; and (2) because it is contrary to the policy of the New York courts to entertain suits involving the tax laws of sister states.

A. *Service upon the Commission within New York State*

The applicable provision of the Federal Rules of Civil Procedure (hereinafter the "Rules") is Rule 4(d)(6), which spells out when to serve when serving a state, municipal corporation or "other governmental organization". Before delving into the particulars of Rule 4(d)(6), it is well to point out that there is no inconsistency, as plaintiffs seem to suggest, in holding that, because the constitutional validity of the Commission is a major issue in this lawsuit, the Commission is not immune from suit under the exception to eleventh amendment immunity carved out by *Ex parte Young, supra,* 209 U.S. 123, and in viewing the Commission as a government agency in order to determine which statutes apply for the purposes of service of process. The varying federal and state rules for service of process on different types of entities, *e.g.*, corporations, governmental agencies or commissions, are keyed to the differing internal structures of those entities. They are set forth in order to assure proper notice of a lawsuit. The overall validity of the entity itself is a separate issue.

Rule 4(d)(6) provides that personal service shall be effected:

> "Upon a state or municipal corporation or other governmental organization thereof subject to suit, by

> delivering a copy of the summons and of the complaint to the *chief executive officer* thereof *or* by serving the summons and complaint in the manner prescribed *by the law of that state* for the service of summons or other like process upon any such defendant." (Emphasis added.)

Clearly, Greene is not the Commission's "chief executive officer"; that person is the Commission's Executive Director, defendant Corrigan. Therefore, we must look to the second half of Rule 4(d)(6) to determine whether service on Greene satisfied the law of "that state".

Defendants contend that the words "that state" refer to the state of which the Commission is an agency; since it is an agency of 21 states, they argue, plaintiffs must comply with the laws for service of process of all 21 member states. It is inconceivable to this Court that Rule 4(d)(6) would require plaintiffs to go through such an exercise as to comply with the laws of 21 states. It seems far more reasonable, given the unique nature of the defendant Commission, to interpret "that state" to mean the state where the Commission is physically located and of which it is a citizen: namely, Colorado.

Turning, then, to the applicable Colorado statute, Rule 4 of Colorado's Rules of Civil Procedure provides, in pertinent part:

> "(e) Personal Service in State. Personal service within the state shall be as follows:
>
> • • •
>
> (9) Upon a department or agency of the state, subject to suit, by delivering a copy thereof to the principal officer, chief clerk, or other executive employee thereof." Colo. Rev. Stat. Rule 4 (1970 Rev.).

Plaintiffs contend that Greene qualifies under Colorado law as the "principal officer, chief clerk, or other executive employee" of the Commission's New York office. The Commission asserts that Greene is in no wise in charge of the Commission's New York activities and has no executive responsibilities. Given this dispute, this Court cannot say, without further inquiry into the facts, whether service upon Greene in New York was sufficient for this Court to acquire in personam jurisdiction over the Commission. Because, however, this Court holds that service upon defendants outside the State of New York was effective, a resolution of this factual issue is unnecessary.

B. Service upon defendants outside the State of New York

Whether the process of this court may extend beyond the territorial limits of the State of New York is a function of the interrelationship of Rule 4 of the Federal Rules of Civil Procedure and N.Y. C.P.L.R. §§302, 312 and 313 (McKinney 1972). Rule 4(f) provides in pertinent part:

> "All process other than a subponea may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state."

Since no federal statute authorizes extra-territorial service in the case at bar, the validity of service outside the state upon each of the defendants depends upon "these rules". The relevant provision is Rule 4(e) which provides, in pertinent part:

> "Whenever a statute or rule of court of the state in which the district court is held provides (1) for the

> service of a summons . . . upon a party not an inhabitant of or found within the state, . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule."

The "statute . . . of court of the state in which the district court is held" which provides "for the service of a summons . . . upon a party not an inhabitant of or found within the state" is N.Y. C.P.L.R. §313, which provides, in relevant part:

> "A person . . . subject to the jurisdiction of the courts of the state under Section 301 or 302 . . . may be served with the summons without the state, in the same manner as service is made within the state. . . ."

New York's long-arm statute, N.Y. C.P.L.R. §302, sets forth the circumstances in which a New York court can exercise personal jurisdiction over a nondomiciliary:

> "(a) *Acts which are the basis of jurisdiction.* As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary . . . who in person or through an agent:
>
> 1. transacts any business within the state. . . ."

Defendants contend that this provision of New York's long-arm statute was intended to deal with causes of action growing out of the conduct of "businesses" and that it has no application to actions against other states or their officials in the administration of their tax laws. They base their argument (1) upon an incorrect interpretation of N.Y. C.P.L.R. §§311 and 312 (McKinney 1972) and (2) upon a body of case law which holds that one state will not enforce the revenue measures of another.

More particularly, defendants argue that §§311 and 312, which prescribe the mode of service on, *inter alia*, governmental organizations, do not specifically state that the mode of service set forth therein is to be applied to governmental organizations where jurisdiction is obtained through §302, as does §313. This argument places the proverbial cart before the horse. Section 313 is not a parallel of §§311 and 312. Whereas §§311 and 312 provide the *mode of service* for entities such as three-judge courts, corporations, and governmental subdivisions, §313 indicates *when* service of process outside the State of New York will give the courts personal jurisdiction over a defendant. Therefore, §§311 and 312 are analogous to N.Y. C.P.L.R. §§307, 308, 309 and 310 (McKinney 1972), which set forth the proper mode of service upon the state, a natural person, an infant or incompetent, and a partnership, respectively. The parallel of §313 is N.Y. C.P.L.R. §314 (McKinney 1972), which sets forth when service of process outside the state will *not* give the courts personal jurisdiction over a defendant. Defendants' argument, carried to its logical conclusion, would mean that the long-arm statute would not apply to corporations either (for the mode of service upon corporations is also described in §311), which of course it does. *Potter's Photographic Applications Co.* v. *Ealing Corp.*, 292 F. Supp. 92 (E.D.N.Y. 1968).

The two cases cited by defendants in support of their argument that §302 does not apply to the governments of sister states—*Sutton* v. *City of Philadelphia*, 286 F. Supp. 143 (S.D.N.Y. 1968) and *Lawrence* v. *Blackwell*, 298 F. Supp. 708 (N.D. Ga. 1969)—are easily distinguishable from the case at bar. Those cases involved the setting aside of service of process upon defendants who were

neither personally within the state nor had agents within the state. In *Sutton* there was no showing of any activities whatsoever by defendants within the forum district; in *Lawrence* there were only isolated cases of mailings to the district by defendants. Both *Sutton* and *Lawrence* are distinguishable from the instant case because defendants maintain an office and conduct audits in the forum state. On the facts presented here, these cases are not in point and cannot be interpreted to establish the broad rule of governmental immunity defendants suggest.

Defendants also argue that the long-arm statute is inapplicable to the instant case by relying upon cases which hold that one state will not enforce the revenue laws of another. The instant case, however, is not one to "enforce revenue measures" or "collect taxes". Plaintiffs are resisting what they claim are unconstitutional actions by the tax collector. Even if it were against New York State policy to entertain this type of suit (a proposition for which defendants cite no relevant authority, certainly not *City of Philadelphia* v. *Cohen*, 11 N.Y.2d 401, 230 N.Y.S.2d 183, 184 N.E.2d 167 (1962)), a federal court would not be forbidden from utilizing the state long-arm statute to obtain personal jurisdiction in a case where federal subject matter jurisdiction clearly obtains. Although defendants do launch an attack on subject matter jurisdiction, as discussed *supra*, they do not question the diversity or federal question basis of this court's jurisdiction.

Accordingly, applying the aforementioned statutes to the facts of the instant case, our inquiry must be whether the defendants have sufficient contacts within the State of New York to serve as a basis for jurisdiction in that state under §302 (§302 rather than §301 since the cause of action

arose out of the New York activity, *i.e.*, the audits) so as to enable this court to exercise personal jurisdiction over the defendants through service of process outside the state of New York, as allowed by §313 and Rule 4(e).

1. Jurisdiction Over the Commission

It is undisputed that the Commission (1) maintains an office in New York; (2) conducts audits on multistate corporations located in the area from that office; (3) employs three auditors in New York who work out of the New York office; and (4) is listed in the Manhattan Telephone Directory.

The fact that the activity engaged in by defendants within New York, *i.e.*, conducting audits, is not a typical commercial enterprise, does not remove it from the ambit of the "transacts any business" test of §302. The term "transacts any business" has been held to include: the execution of a separation agreement, *Kochenthal* v. *Kochenthal*, 26 App. Div. 2d 117, 282 N.Y.S.2d 36 (1967); the making of a retainer for legal services, *Elman* v. *Belson*, 32 App. Div. 2d 422, 302 N.Y.S.2d 961 (1969); the entry into New York by nondomiciliary defendants to attend one meeting concerning shares held in street name by a New York broker, *Parker* v. *Rogerson*, 33 App. Div. 2d 284, 307 N.Y.S.2d 986, *appeal dismissed*, 26 N.Y.2d 964, 311 N.Y.S.2d 7, 259 N.E.2d 479 (1970); and the entry into New York by a nondomiciliary to receive medical treatment, *Cohen* v. *Haberkorn*, 30 App. Div. 2d 530, 291 N.Y.S. 2d 119 (1968). The test is whether the defendant has engaged in "some purposeful activity in this State in connection with the matter in suit." *Longines-Wittnauer*

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Watch Co. v. *Barnes & Reinecke*, 15 N.Y.2d 443, 457, 261 N.Y.S.2d 8, 18, 209 N.E.2d 68, 76 (1965). Clearly, the Commission's conducting of audits is "purposeful activity" in the State of New York within the meaning of the "transacts any business" test of §302.

Once a basis for jurisdiction has been established under §302, §313 directs that service of process may be made "without the state, in the same manner as service is made within the state." The applicable New York statute is N.Y. C.P.L.R. §312, which provides, in pertinent part:

> ". . . Personal service upon a board or commission having a chairman or other presiding officer, secretary or clerk, by whatever official title he is called, may be made by delivering the summons to him. . . ."

In the instant case the service of a copy of the summons and complaint upon defendant Corrigan, as the Commission's Executive Director in Colorado, was sufficient to confer personal jurisdiction over the Commission in this court.

2. Jurisdiction Over the Individual Defendants

The individual defendants are charged with violations of the Civil Rights Act, and in this regard, relief is sought against them individually. *See United States ex rel. Wood* v. *Blacker*, 335 F. Supp. 43 (D.N.J. 1971). Service of process outside the State of New York is permissible to confer in personam jurisdiction over them in this court if a basis for the exercise of jurisdiction exists under §302. In determining whether these defendants have engaged in "purposeful activity" in this state in connection with the matter in suit, service performed by their agents may be attributed to the defendants for jurisdictional purposes.

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Collateral Factors Corp. v. *Meyers*, 39 App. Div. 2d 27, 29-30, 330 N.Y.S.2d 833, 835 (1972). Therefore, the acts of Greene and the other auditors in New York must be attributed to the individual Commissioners and such acts therefore serve as the basis of jurisdiction over them as well as over the Commission itself. Accordingly, service upon the individual defendants in their home states was proper.

IV. Failure to State a Claim

Defendants move pursuant to Rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted. This motion is frivolous. The well-settled rule is that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *K.S. Corp.* v. *Chemstrand Corp.*, 198 F. Supp. 310 (S.D.N.Y. 1961). Both sides have submitted lengthy and erudite briefs discussing the merits of the claims raised in the complaint. The fact that the parties found it necessary to so extensively brief the sufficiency of the claims tells this Court that a decision must await a determination on the merits.

Accordingly, defendants' motions to dismiss the action on the grounds that this court lacks jurisdiction over the subject matter and persons of the defendants, and for failure to state a claim upon which relief can be granted are denied in all respects.

So ordered.

Dated: New York, New York
September 17, 1973

/s/ Charles H. Tenney

U.S.D.J.

APPENDIX C

THE JUDGMENT OF THE DISTRICT COURT ENTERED JULY 14, 1976

Appendix C

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 3438 (CLB)

UNITED STATES STEEL CORPORATION, STANDARD BRANDS INCORPORATED, GENERAL MILLS, INC., and THE PROCTER & GAMBLE DISTRIBUTING COMPANY, on behalf of themselves and all persons similarly situated,

Plaintiffs,

and

BRISTOL-MYERS CO., ELTRA CORPORATION, GOODYEAR TIRE AND RUBBER COMPANY, GREEN GIANT COMPANY, INTERNATIONAL HARVESTER COMPANY, INTERNATIONAL PAPER COMPANY, INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, McGRAW-HILL, INC., N.L. INDUSTRIES, INC. and UNION CARBIDE CORPORATION,

Intervenor-Plaintiffs,

against

MULTISTATE TAX COMMISSION, EUGENE F. CORRIGAN, Executive Director, Multistate Tax Commission, and ERIC E. WOHLFORTH (Alaska), RICHARD HEATH (Arkansas), JOHN H. HECKERS (Colorado), J. ED. STRAUGHN (Florida), RALPH W. KONDO (Hawaii), EWING H. LITTLE (Idaho), JAS. O. MATHIS (Indiana), JAMES T. McDONALD (Kansas), ALLISON GREEN (Michigan), JAMES SCHAFFNER (Missouri), J. MORLEY COOPER (Montana), WM. E. PETERS (Nebraska), JOHN J. SHEEHAN (Nevada), FRED L. O'CHESKEY (New Mexico), BRYON L. DORGAN (North Dakota), CHARLES H. MACK (Oregon), ROBERT F. CALVERT (Texas), VERNON L. HOLMAN (Utah), GEORGE KINNEAR (Washington) and E. S. MacCLEAN (Wyoming), all Commissioners of the Multistate Tax Commission from their respective states,

Defendants.

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Defendants having moved the Court for summary judgment, pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before a Statutory Court consisting of the Honorables Meskill, C.J., Weinfeld, D.J., and Brieant, D.J., and the Court thereafter on July 8, 1976, having handed down its memorandum opinion granting the said motion, and directing the Clerk to enter judgment, it is,

ORDERED, ADJUDGED and DECREED: That defendants Multistate Tax Commission, Eugene F. Corrigan, Executive Director, Multistate Tax Commission, and Eric E. Wohlforth (Alaska), Richard Heath (Arkansas), John H. Heckers (Colorado), J. Ed. Straughn (Florida), Ralph W. Kondo (Hawaii), Ewing H. Little (Idaho), Jas. O. Mathis (Indiana), James T. McDonald (Kansas), Allison Green (Michigan), James Schaffner (Missouri), J. Morley Cooper (Montana), Wm. E. Peters (Nebraska), John J. Sheehan (Nevada), Fred L. O'Cheskey (New Mexico), Bryon L. Dorgan (North Dakota), Charles H. Mack (Oregon), Robert F. Calvert (Texas), Vernon L. Holman (Utah), George Kinnear (Washington) and E. S. MacClean (Wyoming), all Commissioners of the Multistate Tax Commission from their respective states have judgment against plaintiffs United States Steel Corporation, Standard Brands Incorporated, General Mills, Inc., and The Procter & Gamble Distributing Company, on behalf of themselves and all persons similarly situated and intervenor-plaintiffs Bristol-Myers Co., Electra Corporation, Goodyear Tire & Rubber Company, Green Giant Co., International Harvester Com-

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pany, International Paper Co., International Telephone & Telegraph Corporation, McGraw-Hill, Inc., N.L. Industries, Inc., and Union Carbide Corporation dismissing the action.

Dated: New York, N.Y.
July 14, 1976

/s/ RAYMOND F. BURGHARDT
Clerk

APPENDIX D

THE NOTICE OF APPEAL

Appendix D

Notice of Apeal to the Supreme Court of the United States

Assigned to Judge Brieant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 3438 (CLB)

UNITED STATES STEEL CORPORATION, *et. al.*, on behalf of themselves and all persons similarly situated,

Plaintiffs,

against

MULTISTATE TAX COMMISSION, *et al.*,

Defendants.

SIRS:

PLEASE TAKE NOTICE, that plaintiffs United States Steel Corporation, Standard Brands Incorporated, General Mills, Inc., and The Procter & Gamble Distributing Company, and intervenor-plaintiffs Bristol-Myers Co., Goodyear Tire & Rubber Company, Green Giant Company, International Harvester Company, International Paper Company, International Telephone & Telegraph Corporation, McGraw-Hill, Inc., NL Industries, Inc., Eltra Corporation, and Union Carbide Corporation, hereby appeal to the Supreme Court of the United States from the judgment entered in this ac-

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tion on July 14, 1976 granting summary judgment to defendants and dismissing the plaintiffs' complaint.

This appeal is taken pursuant to 28 U.S.C. §1253,

Dated: New York, New York
September 7, 1976

Yours, etc.,

WHITE & CASE

By Thomas McGarrey

A Member of the Firm
Attorneys for Plaintiffs
and Intervenor Plaintiffs
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To:

William D. Dexter, Esq.
and Eaton VanWinkle
& Greenspoon, Esqs.
Attorneys for Defendants
600 Third Avenue
New York, New York 10016

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Certificate of Service

September 7, 1976

I hereby certify that on this 7th day of September, 1976, copies of this Notice of Appeal were mailed, postage prepaid, to William D. Dexter, Esq. and Eaton VanWinkle & Greenspoon, Esqs., attorneys for defendants, 600 Third Avenue, New York, New York 10016. I further certify that all parties required to be served have been served.

/s/ TODD B. SOLLIS

TODD B. SOLLIS

APPENDIX E

THE MULTISTATE TAX COMPACT AS PROPOSED FOR ENACTMENT

Appendix E

Multistate Taxation

Multistate Tax Compact—The Law

Below is reproduced the model act proposed for enactment as the multistate tax compact for the various states. With minor nonsubstantive exceptions, this is the act each member state has enacted.

Article I. Purposes

The purposes of this compact are to: (1) Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) Promote uniformity or compatibility in significant components of tax systems; (3) Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; (4) Avoid duplicative taxation.

Article II. Definitions

As used in this compact:

1. "**State**" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any Territory or Possession of the United States.

2. "**Subdivision**" means any governmental unit or special district of a State.

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3. "Taxpayer" means any corporation, partnership, firm, association, governmental unit or agency or person acting as a business entity in more than one State.

4. "Income Tax" means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, one or more forms of which expenses are not specifically and directly related to particular transactions.

5. "Capital stock tax" means a tax measured in any way by the capital of a corporation considered in its entirety.

6. "Gross receipts tax" means a tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax and income tax.

7. "Sales tax" means a tax imposed with respect to the transfer for a consideration of ownership, possession or custody of tangible personal property or the rendering of services measured by the price of the tangible personal property transferred or services rendered and which is required by State or local law to be separately stated from the sales price by the seller, or which is customarily separately stated from the sales price, but does not include a tax imposed exclusively on the sale of a specifically identified commodity or article or class of commodities or articles.

8. "Use tax" means a nonrecurring tax, other than a sales tax, which (a) is imposed on or with respect to the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property or the leasing of that property from another including any consumption, keeping, retention, or other use of tangible personal property and (b) is complementary to a sales tax.

9. "Tax" means an income tax, capital stock tax, gross receipts tax, sales tax, use tax, and any other tax which has a multistate impact, except that the provisions of Articles III, IV and V of this compact shall apply only to the taxes specifically designated therein and the provisions of Article IX of this compact shall apply only in respect to determinations pursuant to Article IV.

Article III. Elements of Income Tax Laws

Taxpayer option, state and local taxes.—1. Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party State or pursuant to the laws of subdivisions in two or more party States may elect to apportion and allocate his income in the manner provided by the laws of such State or by the laws of such States and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with Article IV. This election for any tax year may be made in all party States or subdivisions thereof or in any one or more of the party States or subdivisions thereof without reference to the election

made in the others. For the purposes of this paragraph, taxes imposed by subdivisions shall be considered separately from State taxes and the apportionment and allocation also may be applied to the entire tax base. In no instance wherein Article IV is employed for all subdivisions of a State may the sum of all apportionments and allocations to subdivisions within a State be greater than the apportionment and allocation that would be assignable to that State if the apportionment or allocation were being made with respect to a State income tax.

Taxpayer option, short form.—2. Each party State or any subdivision thereof which imposes an income tax shall provide by law that any taxpayer required to file a return, whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property, and whose dollar volume of gross sales made during the tax year within the State or subdivision, as the case may be, is not in excess of $100,000 may elect to report and pay any tax due on the basis of a percentage of such volume and shall adopt rates which shall produce a tax which reasonably approximates the tax otherwise due. The Multistate Tax Commision, not more than once in five years, may adjust the $100,000 figure in order to reflect such changes as may occur in the real value of the dollar, and such adjusted figure, upon adoption by the Commission, shall replace the $100,000 figure specifically provided herein. Each party State and subdivision thereof may make the same election available to taxpayers additional to those specified in this paragraph.

Coverage.—3. Nothing in this Article relates to the reporting or payment of any tax other than an income tax.

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Article IV. Division of Income

Definitions.—1. As used in this Article, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, investment company, or any type of insurance company.

(e) "Nonbusiness income" means all income other than business income.

(f) "Public utility" means any business entity (1) which owns or operates any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, except by pipe line, or the production, transmission, sale, delivery, or furnishing

Appendix E

of electricity, water or steam; and (2) whose rates of charges for goods or services have been established or approved by a Federal, State or local government or governmental agency.

(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article.

(h) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any Territory or Possession of the United States, and any foreign country or political subdivision thereof.

(i) "This State" means the State in which the relevant tax return is filed or, in the case of application of this Article to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed.

2. Any taxpayer having income from business activity which is taxable both within and without this State, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this Article. If a taxpayer has income from business activity as a public utility but derives the greater percentage of his income from activities subject to this Article, the taxpayer may elect to allocate and apportion his entire net income as provided in this Article.

3. For purposes of allocation and apportionment of income under this Article, a taxpayer is taxable in another State if (1) in that State he is subject to a net income tax,

a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that State has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the State does or does not.

4. Rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute non-business income, shall be allocated as provided in paragraphs 5 through 8 of this Article.

5. (a) Net rents and royalties from real property located in this State are allocable to this State.

(b) Net rents and royalties from tagible personal property are allocable to this State: (1) if and to the extent that the property is utilized in this State, or (2) in their entirety if the taxpayer's commercial domicile is in this State and the taxpayer is not organized under the laws of or taxable in the State in which the property is utilized.

(c) The extent of utilization of tangible personal property in a State is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the State during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental of royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the State in which the property

was located at the time the rental or royalty payer obtained possession.

6. (a) Capital gains and losses from sales of real property located in this State are allocable to this state.

(b) Capital gains and losses from sales of tangible personal property are allocable to this State if (1) the property had a situs in this State at the time of the sale, or (2) the taxpayer's commercial domicile is in this State and the taxpayer is not taxable in the State in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

7. Interest and dividends are allocable to this State if the taxpayer's commercial domicile is in this state.

8. (a) Patent and copyright royalties are allocable to this State: (1) if and to the extent that the patent or copyright is utilized by the payer in this State, or (2) if and to the extent that the patent copyright is utilized by the payer in a State in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this State.

(b) A patent is utilized in a State to the extent that it is employed in production, fabrication, manufacturing, or other processing in the State or to the extent that a patented product is produced in the State. If the basis of receipts from patent royalties does not permit allocation to State or if the accounting procedures do not reflect States of

utilization, the patent is utilized in the State in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a State to the extent that printing or other publication originates in the State. If the basis of receipts from copyright royalties does not permit allocation to States or if the accounting procedures do not reflect States of utilization, the copyright is utilized in the State in which the taxpayer's commercial domicile is located.

9. All business income shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

10. The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this State during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

11. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

12. The average value of property shall be determined by averaging the values at the beginning and ending of the

tax period but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

13. The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

14. Compensation is paid in this state if:

(a) the individual's service is performed entirely within the State;

(b) the individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or

(c) some of the service is performed in the State and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the State, or (2) the base of operations or the place from which the service is directed or controlled is not in any State in which some part of the service is performed, but the individual's residence is in this State.

15. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this State during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

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16. Sales of tangible personal property are in this State if:

(a) the property is delivered or shipped to a purchaser, other than the United States Government, within this State regardless of the f.o.b. point or other conditions of the sale; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this State and (1) the purchaser is the United States Government or (2) the taxpayer is not taxable in the State of the purchaser.

17. Sales, other than sales of tangible personal property, are in this State if:

(a) the income-producing activity is performed in this State; or

(b) the income-producing activity is performed both in and outside this State and a greater proportion of the income-producing activity is performed in this State than in any other State, based on costs of performance.

18. If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors;

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(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Article V. Elements of Sales and Use Tax Laws

Tax credit.—1. Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another State and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the State, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

Exemption certificates, vendors may rely.—2. Whenever a vendor receives and accepts in good faith from a purchaser a resale or other exemption certificate or other written evidence of exemption authorized by the appropriate State or subdivision taxing authority, the vendor shall be relieved of liability for a sales or use tax with respect to the transaction.

Article VI. The Commission

Organization and management.—1. (a) The Multistate Tax Commission is hereby established. It shall be composed of one "member" from each party State who shall be the head of the State agency charged with the admin-

istration of the types of taxes to which this compact applies. If there is more than one such agency the State shall provide by law for the selection of the Commission member from the heads of the relevant agencies. State law may provide that a member of the Commission be represented by an alternate but only if there is on file with the Commission written notification of the designation and identity of the alternate. The Attorney General of each party State or his designee, or other counsel if the laws of the party State specifically provide, shall be entitled to attend the meetings of the Commission, but shall not vote. Such Attorneys General, designees, or other counsel shall receive all notices of meetings required under paragraph 1(e) of this Article.

(b) Each party State shall provide by law for the selection of representatives from its subdivisions affected by this compact to consult with the Commission member from that State.

(c) Each member shall be entitled to one vote. The Commission shall not act unless a majority of the members are present, and no action shall be binding unless approved by a majority of the total number of members.

(d) The Commission shall adopt an official seal to be used as it may provide.

(e) The Commission shall hold an annual meeting and such other regular meetings as its bylaws may provide and such special meetings as its Executive Committee may determine. The Commission bylaws shall specify the dates of the annual and any other regular meetings, and shall

provide for the giving of notice of annual, regular and special meetings. Notice of special meetings shall include the reasons therefor and an agenda of the items to be considered.

(f) The Commission shall elect annually, from among its members, a Chairman, a Vice Chairman and a Treasurer. The Commission shall appoint an Executive Director who shall serve at its pleasure, and it shall fix his duties and compensation. The Executive Director shall be Secretary of the Commission. The Commission shall make provision for the bonding of such of its officers and employees as it may deem appropriate.

(g) Irrespective of the civil service, personnel or other merit system laws of any party State, the Executive Director shall appoint or discharge such personnel as may be necessary for the performance of the functions of the Commission and shall fix their duties and compensation. The Commission bylaws shall provide for personnel policies and programs.

(h) The Commission may borrow, accept or contract for the services of personnel from any State, the United States, or any other governmental entity.

(i) The Commission may accept for any of its purposes and functions any and all donations and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any governmental entity, and may utilize and dispose of the same.

(j) The Commission may establish one or more offices for the transacting of its business.

(k) The Commission shall adopt bylaws for the conduct of its buisness. The Commission shall publish its bylaws in convenient form, and shall file a copy of the bylaws and any amendments thereto with the appropriate agency or officer in each of the party States.

(l) The Commission annually shall make to the Governor and legislature of each party State a report covering its activities for the preceding year. Any donation or grant accepted by the Commission or services borrowed shall be reported in the annual report of the Commission, and shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender. The Commission may make additional reports as it may deem desirable.

Committees.—2. (a) To assist in the conduct of its business when the full Commisison is not meeting, the Commission shall have an Executive Committee of seven members, including the Chairman, Vice Chairman, Treasurer and four other members elected annually by the Commission. The Executive Committee, subject to the provisions of this compact and consistent with the policies of the Commission, shall function as provided in the bylaws of the Commission.

(b) The Commission may establish advisory and technical committees, membership on which may include private persons and public officials, in furthering any of its activities. Such committees may consider any matter of concern to the Commission, including problems of special interest to any party State and problems dealing with particular types of taxes.

(c) The Commission may establish such additional committees as its bylaws may provide.

Powers. 3. In addition to powers conferred elsewhere in this compact, the Commission shall have power to: (a) Study State and local tax systems and particular types of State and local taxes; (b) Develop and recommend proposals for an increase in uniformity or compatibility of State and local tax laws with a view toward encouraging the simplification and improvement of State and local tax law and administration; (c) Compile and publish information as in its judgment would assist the party States in implementation of the compact and taxpayers in complying with State and local tax laws; (d) Do all things necessary and incidental to the administration of its functions pursuant to this compact.

4. (a) The Commission shall submit to the Governor or designated officer or officers of each party State a budget of its estimated expenditures for such period as may be required by the laws of that State for presentation to the legislature thereof.

(b) Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amounts to be appropriated by each of the party States. The total amount of appropriations requested under any such budget shall be apportioned among the party States as follows: one-tenth in equal shares; and the remainder in proportion to the amount of revenue collected by each party State and its subdivisions from income taxes, capital stock taxes, gross receipts taxes, sales and use taxes. In

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determining such amounts, the Commission shall employ such available public sources of information as in its judgment, present the most equitable and accurate comparisons among the party States. Each of the Commission's budgets of estimated expenditures and requests for appropriations shall indicate the sources used in obtaining information employed in applying the formula contained in this paragraph.

(c) The Commission shall not pledge the credit of any party State. The Commission may meet any of its obligations in whole or in part with funds available to it under paragraph (1) (i) of this Article: provided that the Commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the Commission makes use of funds available to it under paragraph 1 (i), the Commission shall not incur any obligation prior to the allotment of funds by the party States adequate to meet the same.

(d) The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under its bylaws. All receipts and disbursements of funds handled by the Commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the Commission.

(e) The accounts of the Commission shall be open at any reasonable time for inspection by duly constituted officers of the party States and by any persons authorized by the Commission.

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(f) Nothing contained in this Article shall be construed to prevent Commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the Commission.

Article VII. Uniform Regulations and Forms

1. Whenever any two or more party States, or subdivisions of party States, have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, sales or use tax, the Commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax, or prescribing uniform tax forms. The Commission may also act with respect to the provisions of Article IV of this compact.

2. Prior to the adoption of any regulation, the Commission shall:

(a) As provided in its bylaws, hold at least one public hearing on due notice to all affected party States and subdivisions thereof and to all taxpayers and other persons who have made timely request of the Commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party States and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the Commission.

3. The Commission shall submit any regulations adopted by it to the appropriate officials of all party States and

subdivisions to which they might apply. Each such State and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures.

Article VIII. Interstate Audits

1. This article shall be in force only in those party States that specifically provide therefor by statute.

2. Any party State or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the Commission to perform the audit on its behalf. In responding to the request, the Commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The Commission may enter into agreements with party States or their subdivisions for assistance in performance of the audit. The Commission shall make charges, to be paid by the State or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

3. The Commission may require the attendance of any person within the State where it is conducting an audit or part thereof at a time and place fixed by it within such State for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may

be required to attend for such purpose at any time and place fixed by the Commission within the State of which he is a resident; provided that such State has adopted this Article.

4. The Commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this Article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the Commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the State or subdivision on behalf of which the audit is being made or a court in the State in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in a State that has adopted this Article.

5. The Commission may decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of satisfactory performance. If the Commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party States or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the Commission.

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6. Information obtained by any audit pursuant to this Article shall be confidential and available only for tax purposes to party States, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the States or subdivisions on whose account the Commission performs the audit, and only through the appropriate agencies or officers of such States or subdivisions. Nothing in this Article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

7. Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party States or any of their subdivisions are not superseded or invalidated by this Article.

8. In no event shall the Commission make any charge against a taxpayer for an audit.

9. As used in this Article, "tax," in addition to the meaning ascribed to it in Article II, means any tax or license fee imposed in whole or in part for revenue purposes.

Article IX. Arbitration

1. Whenever the Commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this Article in effect, notwithstanding the provisions of Article VII.

2. The Commission shall select and maintain an Arbitration Panel composed of officers and employees of State

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and local governments and private persons who shall be knowledgeable and experienced in matters of tax law and administration.

3. Whenever a taxpayer who has elected to employ Article IV, or whenever the laws of the party State or subdivision thereof are substantially identical with the relevant provisions of Article IV, the taxpayer, by written notice to the Commission and to each party State or subdivision thereof that would be affected, may secure arbitration of an apportionment or allocation, if he is dissatisfied with the final administrative determination of the tax agency of the State or subdivision with respect thereto on the ground that it would subject him to double or multiple taxation by two or more party States or subdivisions thereof. Each party State and subdivision thereof hereby consents to the arbitration as provided herein, and agrees to be bound thereby.

4. The Arbitration Board shall be composed of one person selected by the taxpayer, one by the agency or agencies involved, and one member of the Commission's Arbitration Panel. If the agencies involved are unable to agree on the person to be selected by them, such person shall be selected by lot from the total membership of the Arbitration Panel. The two persons selected for the Board in the manner provided by the foregoing provisions of this paragraph shall jointly select the third member of the Board. If they are unable to agree on the selection, the third member shall be selected by lot from among the total membership of the Arbitration Panel. No member of a Board selected by lot

shall be qualified to serve if he is an officer or employee or is otherwise affiliated with any party to the arbitration proceeding. Residence within the jurisdiction of a party to the arbitration proceeding shall not constitute affiliation within the meaning of this paragraph.

5. The Board may sit in any State or subdivision party to the proceeding, in the State of the taxpayer's incorporation, residence or domicile, in any State where the taxpayer does business, or in any place that it finds most appropriate for gaining access to evidence relevant to the matter before it.

6. The Board shall give due notice of the times and places of its hearings. The parties shall be entitled to be heard, to present evidence, and to examine and cross-examine witnesses. The Board shall act by majority vote.

7. The Board shall have power to administer oaths, take testimony, subpoena and require the attendance of witnesses and the production of accounts, books, papers, records, and other documents, and issue commissions to take testimony. Subpoenas may be signed by any member of the Board. In case of failure to obey a subpoena, and upon application by the Board, any judge of a court of competent jurisdiction of the State in which the Board is sitting or in which the person to whom the subpoena is directed may be found may make an order requiring compliance with the subpoena, and the court may punish failure to obey the order as a contempt. The provisions of this paragraph apply only in States that have adopted this Article.

8. Unless the parties otherwise agree the expenses and other costs of the arbitration shall be assessed and allocated among the parties by the Board in such manner as it may determine. The Commission shall fix a schedule of compensation for members of Arbitration Boards and of other allowable expenses and costs. No officer or employee of a State or local government who serves as a member of a Board shall be entitled to compensation therefor unless he is required on account of his service to forego the regular compensation attaching to his public employment, but any such Board member shall be entitled to expenses.

9. The Board shall determine the disputed apportionment or allocation and any matter necessary thereto. The determinations of the board shall be final for purposes of making the apportionment or allocation, but for no other purpose.

10. The Board shall file with the Commission and with each tax agency represented in the proceeding: the determination of the Board; the Board's written statement of its reasons therefor; the record of the Board's proceedings; and any other documents required by the arbitration rules of the Commission to be filed.

11. The Commission shall publish the determinations of Boards together with the statements of the reasons therefor.

12. The Commission shall adopt and publish rules of procedure and practice and shall file a copy of such rules and of any amendment thereto with the appropriate agency or officer in each of the party States.

13. Nothing contained herein shall prevent at any time a written compromise of any matter or matters in dispute, if otherwise lawful, by the parties to the arbitration proceeding.

Article X. Entry into Force and Withdrawal

1. This compact shall enter into force when enacted into law by any seven States. Thereafter, this compact shall become effective as to any other State upon its enactment thereof. The Commission shall arrange for notification of all party States whenever there is a new enactment of the compact.

2. Any party State may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal.

3. No proceeding commenced before an Arbitration Board prior to the withdrawal of a State and to which the withdrawing State or any subdivision thereof is a party shall be discontinued or terminated by the withdrawal, nor shall the Board thereby lose jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein.

Article XI. Effect on Other Laws and Jurisdictions

Nothing in this compact shall be construed to: (a) Affect the power of any State or subdivision thereof to fix rates of taxation, except that a party State shall be obli-

gated to implement Article III 2 of this compact; (b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than a sales tax, provided that the definition of "tax" in Article VIII 9 may apply for the purposes of that Article and the Commission's powers of study and recommendation pursuant to Article VI 3 may apply; (c) Withdrawal or limit the jurisdiction of any State or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body; (d) Supersede or limit the jurisdiction of any court of the United States.

Article XII. Construction and Severability

This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any State or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining party States and in full force and effect as to the State affected as to all severable matters.

APPENDIX F

THE MEMORANDUM ORDER OF JUDGE TENNEY DATED FEBRUARY 5, 1974

Appendix F

A Memorandum Order of Judge Tenney Dated February 5, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 3438 (CHT)
#40335

UNITED STATES STEEL CORPORATION, *et al.*,
Plaintiffs,

against

MULTISTATE TAX COMMISSION, *et al.*,
Defendants.

TENNEY, J.

Plaintiffs, four corporations which seek to have the Multistate Tax Compact ("Compact") and, in particular, Article VIII of the Compact, declared unconstitutional, have moved pursuant to Fed. R. Civ. P. 23(c) for an order permitting them to maintain this action as a class action under Fed. R. Civ. P. 23(b)(1) and/or (2). In addition, sixteen corporations[1] have moved pursuant to Fed. R. Civ.

1. The Goodyear Tire & Rubber Company; McGraw-Hill, Inc.; International Telephone and Telegraph Corporation; International Paper Company; Eltra Corporation; Bristol-Myers Company; Xerox Corporation; Green Giant Company; Union Carbide Corporation; International Harvester Company; International Business Machines Corp.; NL Industries, Inc.; Bethlehem Steel Corporation; Trans Union Corporation and two of its subsidiaries, Union Tank Car Company and Ecodyne Corporation.

P. 24(b) for an order permitting them to intervene as plaintiffs in the action. For the reasons stated *infra*, both motions are granted and plaintiffs and twelve of the applicants[2] will be permitted to maintain this suit on behalf of all multistate taxpayers who have been or may be threatened with interstate audits by the Multistate Tax Commission ("Commission").

As indicated in an earlier opinion, *United States Steel Corporation, et al.* v. *Multistate Tax Commission, et al.*, 72 Civ. 3438 (S.D.N.Y., Sept. 17, 1973), the Compact was established to achieve greater uniformity in the area of state taxation of interstate businesses and to reduce double taxation. The Compact has been adopted by 21 states. Article VIII of the Compact, adopted by 17 of those states,[3] permits the Commission, the body which administers the provisions of the Compact, to conduct interstate audits and to issue subpoenas in connection with those audits. Plaintiffs seek injunctive and declaratory relief, claiming that:

> (1) the Compact is unconstitutional under Article I, §10, cl. 3 of the United States Constitution because Congress has not given its consent to it;

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2. The four corporations which will not be permitted to intervene are Bethlehem Steel Corporation, Trans Union Corporation, Union Tank Car Company and Ecodyne Corporation. They joined in the motion to intervene after all legal argument on this motion was completed—October 18, 1973. As discussed more fully in the text, the other twelve corporations are being permitted to intervene as plaintiffs and as class representatives to correct the problem of overbreadth and to permit adjudication in a single action of all of the issues raised in the complaint. Inasmuch as these four corporations would not add anything of substance to this case and the maintenance of this action as a class action will as a practical matter be dispositive of their interests, the Court cannot see any reason why they should be permitted to intervene in this action.

3. Section 1 of Article VIII provides that this article shall be applicable only in those states party to the Compact which specifically adopt the Article by statute.

(2) the Compact is unconstitutional under Article I, §8 of the Constitution because it

(a) encroaches upon an area over which Congress has been given exclusive authority under the United States Constitution and

(b) discriminates against taxpayers engaged in interstate commerce;

(3) the Compact—or more accurately, Article VIII of the Compact—is unconstitutional under the due process and equal protection clauses of the fourteenth amendment because it gives to the 17 states which have adopted it auditing and subpoena powers not otherwise available to them in connection with the performance of intrastate audits; and

(4) the Compact—or more accurately, Article VIII of the Compact—is unconstitutional under the fourth amendment because it requires interstate taxpayers to submit to audits by Commission auditors

(a) who are agents of an unconstitutional body,

(b) who are unqualified under applicable state law and

(c) to whom state confidentiality requirements are inapplicable and unenforceable.

Plaintiffs, which have been ordered to submit to interstate audits by the Commission, ask the Court to declare them proper representatives of a class consisting of all multistate taxpayers who have been or may be threatened with interstate audits by the Commission. It is claimed that the class is so numerous that joinder of all members is impracticable; the questions of law and fact raised by plain-

tiffs' claims are common to and typical of the class; plaintiffs will adequately and fairly represent the class; the prosecution of separate actions would create the risk of inconsistent adjudications establishing incompatible standards of conduct for defendants (Fed. R. Civ. P. 23(b)(1)(A)); adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members or might substantially impair or impede their ability to protect their interests (Fed. R. Civ. P. 23(b)(1)(B)); and the defendants threaten to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole (Fed. R. Civ. P. 23(b)(2)).

Defendants argue that plaintiffs have not met all of the prerequisites to a class action found in Fed. R. Civ. P. 23(a) because (1) the definition of the purported class is too broad; (2) plaintiffs, large corporations, cannot fairly and adequately protect the interests of many members of the purported class because their interests are antagonistic to the interests of many other interstate concerns; and (3) the claims heretofore designated as 3, 4(b) and 4(c) are not typical of the claims of the purported class and do not involve common questions of law or fact.

Plaintiffs seek to represent all interstate taxpayers who have been or may be threatened with interstate audits by the Commission. However, plaintiffs are subject to taxation in only 11 of the 17 states which have adopted Article VIII. Thus, plaintiffs cannot represent those interstate taxpayers which are subject to taxation under the Compact

by any of the six remaining states which have adopted that provision. *Cf. Gesicki* v. *Oswald,* 336 F. Supp. 371, 373-74. However, sixteen corporations which *are* subject to taxation by the six remaining states have moved pursuant to Fed. R. Civ. P. 24(b) to intervene as plaintiffs in the action. If the twelve corporations which asked for permission to intervene before argument on this motion was completed were allowed to intervene as plaintiffs and as class representatives, then that defect in representation would be cured.

Defendants ask that the motion to intervene be denied because (1) the applicants do not add anything to the nature of plaintiffs' complaint; (2) the applicants make no showing that their interests are not adequately represented; and (3) defendants will be prejudiced because they will now be required to research the laws of six additional states in order to defend against the allegations contained in the third and fourth claims of plaintiffs' complaint.

Under Fed. R. Civ. P. 24(b), the Court must determine whether the applicants' claim and the main action have a question of law or fact in common and whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The applicants, all of which have been ordered to submit to audits by the Commission since the initiation of the instant action, clearly present claims which have questions of law and fact in common with the main action. Indeed, they propose to adopt plaintiffs' complaint in its entirety and would merely supplement it by adding allegations regarding their respective places of incorporation. In addition, their motions have been made at a particularly opportune time. Substantial discovery has not yet taken place and the Court has not yet examined the merits of the case.

It is true, of course, that an applicant should not be permitted to intervene if his participation in the case would not add anything to it. *See, e.g., First Congregational Church* v. *Evangelical & Reformed Church,* 21 F.R.D. 325, 327-28 (S.D.N.Y. 1958); *Kind* v. *Markham,* 7 F.R.D. 265, 266 (S.D.N.Y. 1945). That is not the case here. The applicants' intervention into the action as plaintiffs and as class representatives will, assuming all other requirements of Fed. R. Civ. P. 23 are met, make maintenance of this action as a class action possible and will permit the Court to dispose of all of the legal issues raised by claims 3, 4(b) and 4(c) in one action.

The Court also finds that intervention will not prejudice defendants. Admittedly, defendants' work is made more difficult because they will be required to research the laws of six additional states. However, because eleven of the twelve applicants are represented by plaintiffs' counsel, defendants need not fear being deluged with "additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybook Fair." *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.,* 51 F. Supp. 972, 973 (D.C. Mass. 1943).

Having found that the problem of overbroadness is cured once twelve of the applicants are permitted to intervene as plaintiffs and as class representatives, the Court will now turn to the second of defendants' arguments—that is, that plaintiffs cannot fairly and adequately represent the

purported class. Under Fed. R. Civ. P. 23(a)(4), the Court must determine whether plaintiffs' (and, for that matter, the twelve applicants') interests are antagonistic to those of the class they claim to represent and, if so, whether those conflicts would interfere with their ability to prosecute this action with that degree of competence and fairness required of them. *See Rosado* v. *Wyman,* 322 F. Supp. 1173, 1192-93 (E.D.N.Y.), *aff'd,* 437 F.2d 619 (2d Cir. 1970), *aff'd,* 402 U.S. 991 (1971).

To defeat plaintiffs' motion, defendants have submitted affidavits which attempt to show that many interstate concerns will benefit from the Compact whereas plaintiffs will profit from its invalidation. For example, it is asserted that medium and small-sized concerns will benefit from the Compact's simplified small business option (Article III)—available in cases in which $100,000 or less of gross receipts are derived from sales within one of the participating states—and from multistate audits, which are less costly for them than the usual state-by-state audits. It is also asserted that certain unidentified large corporations favor the Compact because they will benefit from the Compact's unitary apportionment of income and dividends of multi-corporate enterprises whereas plaintiffs oppose the Compact because they will be taxed more heavily under it.

However real the alleged conflicts may be, they have nothing to do with the subject matter of the action: the constitutionality of the Compact and of Article VIII. *Cf. Berman* v. *Narragansett Racing Ass'n,* 414 F.2d 311, 317 (1st Cir. 1969), *cert. denied,* 396 U.S. 1037 (1970); *Redmond* v. *Commerce Trust Co.,* 144 F.2d 140, 151-52 (8th Cir. 1944),

cert. denied, 323 U.S. 776 (1944); *Frankel* v. *Wyllie & Thornhill, Inc.,* 55 F.R.D. 330, 334 (W.D. Va. 1972); *Dawson* v. *Delaney,* 189 F. Supp. 416, 419 (D. Del. 1960). It simply cannot be inferred that, because some interstate concerns favor certain portions of the Compact and Article VIII of the Compact, they believe them to be constitutional. True, some members of the class may not wish to maintain this suit because of the benefits they hope to achieve if the Court upholds the constitutionality of the Compact and Article VIII. However, resolution of the issues involved here will be dispositive of their rights and obligations, whether or not they approve of the maintenance of this suit. *Cf. Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920, 937 (2d Cir. 1968); *Davy* v. *Sullivan,* 354 F. Supp. 1320, 1325 (M.D. Ala. 1973); *Snyder* v. *Board of Trustees of University of Illinois,* 286 F. Supp. 927, 931 (N.D. Ill. 1968); *Dawson* v. *Delaney, supra,* 189 F. Supp. at 419. Whatever motives plaintiffs may have in seeking to invalidate the Compact and Article VIII, there is no suggestion that plaintiffs would, because of their antipathy to the Compact, compromise or in any way prejudice the class by failing to pursue all legal remedies available. *Compare Hansberry* v. *Lee,* 311 U.S. 32, 39, 44-45 (1940).

The third argument which defendants make is that several of the claims—those claims heretofore designated as claims 3, 4(b) and 4(c)—arise under different state statutes so that the requirements of Fed. R. Civ. P. 23(a)(2) and (3) are not met. Defendants reason that no member of the purported class can represent other members where resolution of these claims depends upon reference to the law of

seventeen states, some of the state statutes are relevant to the claims of some members of the class while other state statutes are relevant to the claims of other members of the class; and the statutes vary from state to state.

That argument has no merit. Clearly, despite the fact that resolution of claims 3, 4(b) and 4(c) will necessitate investigation of the laws of seventeen states, the claims themselves involve questions of law common to all members of the proposed class; whether the 17 states which have adopted Article VIII unreasonably discriminate against interstate, as opposed to intrastate, taxpayers and whether the effect of Article VIII is to require interstate taxpayers to submit to unconstitutional audits because Commission auditors are unqualified under applicable state law and are not bound by state confidentiality requirements.

Nor can it be contended that plaintiffs' claims are not typical of, or coextensive with, the claims of other members of the purported class. Plaintiffs, the twelve applicants and other members of the proposed class are similarly situated. Their claims arise under Article VIII of the Compact and not, as defendants urge, under the laws of seventeen different states. Moreover, there is nothing which would indicate that plaintiffs are in a unique position so that an interstate audit of plaintiffs, and plaintiffs alone, would be unconstitutional. *Cf. Dale* v. *Hahn*, 440 F.2d 633, 640 (2d Cir. 1971).

It is therefore clear that plaintiffs, aided by the entrance into this action of the twelve applicants, have established all of the prerequisites for a class action (Fed. R. Civ. P. 23(a)(1)-(4)). The Court also finds that the instant action may be maintained as a class action because adjudication of

plaintiffs' and of the twelve applicants' claims will as a practical matter be dispositive of the interests of other interstate taxpayers who have been or may be threatened with audits by the Commission (Fed. R. Civ. P. 23(b)(1)(B)) and the defendants have acted or will act on grounds generally applicable to the class, thereby making appropriate final injunctive or declaratory relief with respect to the class as a whole (Fed. R. Civ. P. 23(b)(2)).

Accordingly, the motion of the twelve corporations to intervene as plaintiffs if the action is granted. In addition, the four corporations which are pesently plaintiffs in the action and the twelve corporations which have been permitted to intervene will be allowed to maintain the action on behalf of all multistate taxpayers who have been or may be threatened with interstate audits by the Commission.

So ordered.

Dated: New York, New York
February 5, 1974

CHARLES H. TENNEY
U.S.D.J.